

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, owner of the SS. "Pennsylvanian,"
her engines, boilers, etc.,

Appellant,

vs.

WESTERN TRANSPORTATION CO.,
a Corporation, owner of the Steamboat
"BARRY K," etc., and Barges 22 and 24,

Appellee,

and

WESTERN TRANSPORTATION CO.,
a Corporation, owner of the Steamboat
"BARRY K," etc., and Barges 22 and 24,

Cross-Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, owner of the SS. "Pennsylvanian,"
her engines, boilers, etc.,

Cross-Appellee.

**BRIEF ON BEHALF OF WESTERN TRANSPORTA-
TION CO., APPELLEE AND CROSS-APPELLANT,
OWNER OF THE "BARRY K" and
BARGES 22 and 24.**

Upon Appeal from the District Court of the United States
for the District of Oregon.

DEY, HAMPSON & NELSON,
CLARENCE J. YOUNG,
800 Pacific Building,
Portland, Oregon,
*Proctors for Western Transportation Co.,
Appellee and Cross-Appellant.*

FILED

JUN 16 1943

PAUL P. O'BRIEN.

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No. 10,316

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Upon Appeal from the District Court of the United States
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Being mindful of the provisions of Rule 20, Sub-
division 3, of this Court we, in answering Appellant's
Brief, will make no statement of the case. Insofar,

however, as we find it necessary to controvert appellant's "concise abstract or statement of case", indication thereof will be made at appropriate places in the argument which follows.

APPELLANT'S SPECIFICATION OF ERROR I.

(App. Br., pp. 12 to 22)

Appellant charges that the trial court erred in not holding that prior to and at the time of the collision the "Barry K" and her barges were being negligently navigated on the lefthand side of the Willamette River in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision.

ARGUMENT

It is a fact that from the time the "Barry K" entered the Willamette River until the moment of collision the "Barry K" was on its east or port side of the river. This circumstance, says opposing counsel (App. Br. p. 12), "was the primary, real and fundamental cause of the collision".

With this statement we are in total disagreement: First, because under proper application of Article 25 of the Inland Rules to the conditions existing at Post Office Bar, it was lawful for the "Barry K" to proceed up its left side of the stream; and, second, because under the circumstances the presence of the "Barry K" on

the east side was a mere condition in no way constituting the proximate cause of the collision.

Article 25 (33 U.S.C.A., Sec. 210) reads:

“In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.”

The quoted rule does not under all circumstances compel steam vessels to keep to their starboard side of the channel; rather such course is required only when “safe and practicable”. Cross-libelant concedes the accuracy of this interpretation by charging in the cross-libel that the “Barry K” failed to keep to that side of the fairways or mid-channel on their own starboard side, *when it was entirely safe and practicable for them to have done so*, all in violation of said Article 25.”

(R. 27) (Italics ours.)

The “Barry K” simply followed the permission granted by Article 25 to use its port side of the river because it was unsafe and impracticable for river boats to use the west side near Post Office Bar, whether such boats be proceeding up or downstream.

The question of safety, and practicality is a matter of degree. Under some circumstances the minds of reasonable men will not differ in deciding whether a par-

ticular action is safe or unsafe. In other cases no such agreement is possible. When such issue arises, no proof is so cogent as the considered opinion of technical experts in the specific field under consideration—here those with years of experience in piloting both river and ocean vessels through the waters in question. We proceed to demonstrate that upon the overwhelming preponderance of the testimony the west side of the River at Post Office Bar was and is unsafe and impracticable for use by river boats, by reason whereof it has been the universal custom for such boats to use the east side of the river.

SAFETY AND PRACTICALITY

Counsel (App. Br. p. 13) casually remarks that a mere statement of the channel conditions “makes the ‘Barry K’s’ violation of the rule so obvious that it seems to us argument is almost superfluous”. Having so stated, counsel consumes fourteen subsequent pages in argument.

In fact no such conclusion can be reached from considering channel conditions and the testimony of the expert pilots in reference thereto. At Post Office Bar there is a long bend in the river, resulting in a deflection of the current so that the natural channel of the river lies along the west bank. True, the river is 1200 feet wide with a 30 foot channel 800 feet wide, and a 35 foot channel 700 feet wide. (See App. Br., p. 5.)

Ocean going ships using the river, however, draw as much as 33 to 35 feet (R. 314, 344), but even as to ships drawing only 27 or 28 feet, it would obviously not be safe to operate in the 30 foot channel since an insufficient factor of safety would be involved. It is to be noted particularly that the distance from the east edge of the 35 foot channel to the east shoreline—on the inside of the curve—is approximately 400 feet (R. 496-7).

The collision occurred in the early morning of February 1, 1941, at a point approximately 200 feet from the east shore (R. 118, 119). The current at the time was about a mile an hour. There is testimony that the breeze from the east was ten to fifteen miles per hour (R. 102, 166). Government Records of seven miles per hour are based upon observations made at Portland, not Post Office Bar.

The reasons why it was unsafe and impracticable for river boats to use the west side of the river will appear from the summarized statements of the testimony which follow:

Captain William A. Reed, Pilot of the "Barry K" had known that for the last 23 or 24 years river craft "without exception" proceeded up the left side of the channel at Post Office Bar (R. 102). The "Barry K" was a stern wheel river boat with an overall length of 190 feet (R. 91). Her superstructure extended 129 feet

along the hull (R. 92). The pilot house extended 34 or 35 feet above the water line (R. 92). The "Barry K" drew 2 feet, 8 inches of water, her barges, one being made up on the bow of the "Barry K", the other laid out on the port side slightly aft of the forward bridge, drawing each as loaded, 4 to 5 feet (R. 101). Each barge was 135 feet long, 35 foot beam, with deck house 20 feet high and 115 feet long (R. 93). The "Barry K" and her barges were, therefore, all light draught boats with superstructures making them particularly vulnerable to cross winds (R. 108). Contrast deep draughted ocean going steamers such as the "Pennsylvanian" which was over 400 feet long and drew, when loaded, a little over 29 feet (R. 466 and 486), and which, when only partly loaded as at the time of the collision, drew 15 feet forward and 19 feet aft (R. 466).

A boat proceeding upstream past Post Office Bar is rounding a long sweeping curve to its left. On the right or west side of the stream there is a dike at least 4,000 feet long with piling extending irregularly 3 or 4 feet out of the water (R. 104, 242). The "Barry K" with tows would have to keep the bow of the tow "better than 200 feet" out from the dike to be safe (R. 105). A flat bottomed river boat, going upstream on the west side, would be subject to side slipping from wind (R. 105). Displacement swells from ocean ships going downstream would present a hazard to such river boat if on the "outside swing". The same effect would not occur if the river boat were going up along the left shore or inside of the

curve (R. 106). Displacement swells make it likely that lines will part (R. 106). On the east side a river boat has 200 feet of shallow water where it can travel completely out of the channel for ocean ships and be protected against the prevailing east wind (R. 105). This protection is afforded by willows on the east bank which stand 20 feet above the water level (R. 134). The superstructure of the "Barry K" and its barges offered resistance to the east wind (R. 108). Following the collision the wind and current carried the barges downstream and across to the west side of the river opposite Post Office Bar rear (R. 120).

E. P. Williams, Master of the "Barry K", had had 33 years' experience on river boats in the Columbia and Willamette Rivers (R. 162). During this time it had been the practice for river boats to use the east side of the river "both ways" because it was safer for them to pass on the east side of the channel (R. 179).

N. W. Stayton, a Columbia River pilot who had handled ocean going ships for 20 years last past, but who had had 40 years' experience in various capacities handling different types of boats on the Willamette and Columbia Rivers, stated that it was neither safe nor practicable for river boats to use the west side (R. 194-5). On the east side the river boats would be "out of the way of traffic" (R. 198). During Stayton's 40 years of experience it had been the custom, well known to Columbia River pilots, for river boats to follow the

east bank (R. 199, 210). River boats, particularly if towing barges with quite a bit of wind resistance would, if using the west side and trying to keep away from ocean traffic, be carried by an easterly wind into the dike (R. 200). A tug such as the "Barry K" with barges would for safety be obliged to stay off the dike about 200 feet (R. 200-1-2). A deep draughted ocean ship going downstream on the inside on the bend would throw its displacement swell and kick water toward the up-river boat (R. 202). An easterly wind—even 10 to 15 miles per hour—striking a flat bottomed river boat with barges having high deck houses would cause side-slippage (R. 205). It is sometimes necessary for river boats to come upstream quartering at almost a 25° angle, thus requiring more water surface than if proceeding straight ahead. On the east side of the stream the river boat would to an extent be protected from the wind by an embankment and trees (R. 207). "You hardly ever go by there, but what you find from one to four or five tugs in that district." (R. 210) By using the east rather than west side of the river these tugs could keep out of the way of the ships (R. 208-9).

In former years when the channel was only 250 feet wide and ocean ships were passing each other, one had to stop while the other drifted by (R. 219). In later years with the channel 600 feet wide the speed at which ocean ships would pass each other depended upon the class of vessel being handled (R. 220). True, as Stayton said, and as counsel argues (App. Br. p. 14), ocean ships

pass port to port, but the hazard at the bend in the river would not apply in the same degree to ocean ships as to a river boat passing an ocean ship. The deep draught and tonnage of ocean ships make them far less susceptible to side-slippage (R. 236) than the shallow-bottomed river boats and barges with their high superstructures (R. 243). That tow boats meet each other and pass on either side as agreed (R. 150, App. Br. p. 14) is not significant because both are subjected to the same hazards.

Counsel makes much ado about Stayton's testimony that there is room in the channel for an upgoing river boat and a downgoing ocean steamer to pass port to port—*providing there is no other ocean steamer in the vicinity* (R. 225, App. Br. p. 16). But mere area of water is not the test. The natural hazards created by the bend in the stream, the prevailing easterly wind which varies in velocity from time to time and changes suddenly (R. 242), existence of the west dike, the shallow water on the east side where river, but not ocean, boats can go with safety, the presence of other traffic in the river, the fact that no pilot before reaching Post Office Bar can know what conditions will prevail there at a particular time—all these changing factors and conditions existing for years before the "Barry K" accident made imperative adoption of the universal practice for southbound river boats to use the east side of the river. The fact that for over 40 years this practice

has been generally, if not universally followed, of itself makes a violation thereof hazardous (R. 691).

Charles W. Ackerman had been a ship's pilot on the Columbia River since 1927, and between 1908 and 1927 was on river boats in some capacity in the Willamette and Columbia (R. 237). His knowledge of the uniform custom, generally known, (R. 247) for river boats to use the east side of the river had continued since 1908 (R. 240-1). It was not practical or safe for river boats to use the west side of the river (R. 238) because the wind coming up would push them ashore; likewise as to the back swell of a passing ship (R. 210). There is danger of being "set against" the 4,000 foot long dike on the west side (R. 242), the east wind coming up suddenly causing side-slippage of even loaded barges which are "like a sailboat" (R. 243). "Kick water from a ship's propeller would hit a river boat and barge going upstream on the west side in the bight." But if the river boat were going up the east side, the kick water would be going "just the opposite from what you are" (R. 244). The bank and willows on the east side of the stream "are just high enough to cut off the wind on the barges" (R. 246). More tow boats pass in the Willamette River between Multnomah Channel and the mouth of the Willamette than at any other point in the Willamette or Columbia Rivers. The greater the number of boats present, the greater the importance of applying factors of safety (R. 248). Assuming a 10 mile easterly wind, the tug and tow would have to keep her stern at

least 200 feet off the dike—the barges would have to extend out into the stream at a 45° angle (R. 253-6).

Charles Boone, now with the Port of Portland, had been a pilot of river boats since 1907. He had passed by Post Office Bar 4,000 to 5,000 times (R. 283). River boats to his knowledge have used the east side of the river since 1899 (R. 286). Asked whether from his experience it was safe or practicable for river boats to use the west side, Boone said:

“Well, that would all depend on who you meet coming down. In my opinion, if they give you plenty of room you might make it, but if you didn’t you are stuck.”

* * *

“My idea was always to eliminate the chance of an accident as much as possible and go up on the east shore.”

* * *

“ * * you are just taking a chance that the other fellow don’t give you enough room to get by, there, and, as I say, it is not a very nice shore to run along close to.”

Henderson B. Davis had operated river boats on the river in varying capacities since 1917 (R. 310). Although he went into the “lower river” twice a week “any-

way" (R. 310), he had never seen a pilot operate river boats on the west side around Post Office Bar except one Astoria boat (R. 311). Uniformly river boat men used the east side from the mouth of the Willamette to St. Johns Bridge (R. 312). Davis said: (R. 314)

"Well, when you see a ship coming down there, you don't know whether it is going to draw nineteen feet of water or thirty-five feet of water. And if you were in there close enough to the bank and the swells from the ship or the kick-up from the stern would come in against you with the tow, why it would set you over into the dike, if you was a couple of hundred feet off the dike and if the wind was blowing, there, and you had to slow down for your lines, to keep the ship swells from parting your lines, and the wind was blowing on that west bank, which it does quite often in the wintertime, why you would blow on that bank, on that west bank." (R. 317)

The piling in the dike on the west side, difficult to see at night (R. 327), presents a hazard to river boats because the bottoms of barges might be punctured thereby (R. 326). River tow boats can "go pretty near up to the (west) bank" (R. 327). The wind there is not as strong because of protection by trees (R. 328). A stern wheel boat side-slips more than a propeller boat (R. 329). Effect of a displacement swell would depend on the draught and speed of an ocean ship (R. 330).

A. T. Lowery had been a Columbia River pilot since 1927. From 1902 to 1927 he ran tow boats on the river (R. 343). River boats stayed on the east side of the river at all times since 1902 (R. 345). It was neither safe nor practical for river boats to "be over in that bend passing ocean ships" (R. 345). The current sets on the break-water along Sauvie's Island. The east wind will set a stern-wheeler and barges onto the break-water. The amount of displacement swell from an ocean ship depends on her speed and draught (R. 346-7). A river boat coming upstream on the east side has 400 feet in the clear of the ship channel in which it, but not the ocean ships, may travel (R. 348). If, when piloting an ocean ship downstream, Lowery should meet a river boat coming upstream on the east side, he would keep the river boat on the starboard side to prevent it from crossing his bow.

Louis L. Fowler, pilot on the Tug Cruiser at the time of the collision (R. 427), had been with Shaver Transportation Company since 1933 (R. 426). River boats used the east side (R. 437). True, as counsel argues, on cross-examination, Fowler said it was "much more convenient" for river boats to come up on the left side and that to do so was "the same as cutting corners" (R. 437-8, App. Br. p. 18). But Fowler also said that whether it would be safe or practicable for tugs and tows to go up the righthand side "would depend upon whatever is approaching." "If another vessel is coming or something, I wouldn't go under there under no circum-

stances * * * because I don't think it is any too safe."
(R. 443)

No witness for appellant made any denial categorically of the existence of this custom. Pilot Norberg of the "Pennsylvanian" admitted that river boats with tows used the east side in the night-time "fifty-fifty" (R. 498). In the daytime "we go all over them" (R. 499). In passing a tug with barges he would slow down his ocean going ship so as not to "embarrass the tug" (R. 508).

William Lumm, testifying for appellant, said that the majority of the barges "probably use the east side" * * * "coming upstream". In operating tow boats with barges up or down the river he himself used "either side" (R. 645). If he had a boat without much power he "wouldn't get anywhere" staying on the west side because there was at least a mile an hour more current on that than on the east side. This certainly would make a difference (R. 646). The stronger the wind, the greater the wind resistance offered by a boat like the "Barry K" and its barges. A breeze of 10 to 15 miles per hour from the east (as testified to by Captain Reed of the "Barry K") would, if the tug and tow were for any reason to stop, "blow you ashore eventually" (R. 652). Lumm admitted that near Mount Coffin, Washington, along Batchelor's Island, near St. Helens, and from Cleveland Dike to Walker's Island, near Stella, Washington, river boats with tows follow the left side of the river (R. 659).

L. O. Hosford was a regular pilot for American-Hawaiian Steamship Company (R. 661). However, out of 30 years' experience on the river, he had piloted tow boats only two years (R. 675). Ocean vessels are not as easy to handle as a river steamer with tow (R. 664). With a heavily laden ship of deep draught "you pretty near have to make up your mind what you are going to do a little ahead of time", particularly if the ship has the current with her (R. 665, 668). He admitted that the "majority of river boats passed ocean ships at Post Office Bar starboard to starboard" because "it is easier going over there" (R. 673).

From the great weight of the foregoing testimony, we submit that it was neither safe nor practicable for river boats to use the west side of the river at Post Office Bar. We summarize the natural hazards:

1. Shallow draughted boats are peculiarly subject to slippage when making an outside turn along this channel which lies along the west bank.

2. The current on the west side is swifter than on the east.

3. The dike on the west side constructed of piling over 4,000 feet long and of uneven height presents a hazard to boats if driven against it. On the east side there is a sand bank.

4. Between the east edge of the dredged 35 foot

ship's channel and the east bank is 400 feet of shoal water available for river boats, but unsafe for use by ocean going ships.

5. Prevailing winds are from the east. The greater their velocity, the heavier their impact against flat-bottomed river boats and barges with their superstructures. The effect of the wind on heavy, deep draughted ocean boats is substantially less.

6. A river boat going up the west side is exposed to the effect of the east wind, but if going up the east side the sand bank topped with willows and cottonwoods affords protection.

Added to the foregoing natural hazards are those incident to the presence of other boats on the river:

1. Ocean going boats are not so readily maneuverable as ocean going tugs, hence it is common sense for the light draughted river boats to keep as far out of the way of the ocean ships as the river boats' light draught will permit.

2. On the east side of the stream river boats can avoid the side-slipping effect of displacement swells and kick water from ocean vessels.

3. River tugs with tows are usually required to stop on meeting other ships to prevent breakage of their lines and while so stopped are at the mercy of the wind, current and propulsive effect of swells and kick water.

4. River traffic past Post Office Bar is heavy—so if two ocean ships meet there, a river boat simultaneously meeting the two ships would constitute a menace to all three ships.

5. Tugs with log rafts, which form a substantial portion of the river traffic, universally use the east side—such a tow, being 1,000 feet or so long, would block the entire channel. Uniformity of use promotes safety.

Counsel need not be fearful of “overstating” our position, which he says (R. 20) is “so novel”. It is apparent that the factors bearing upon safety and practicality are variable: Direction of wind, its velocity, amount of current in stream, nature of weather, stormy or clear, day or night, the nature, position and number of vessels at or near Post Office Bar when a particular river boat is about to pass.

Safety and practicality, therefore, do not *necessarily* depend on the conditions existing at a particular moment of time. To avoid chaos there was adopted a universal pactice for river boats to use the east side of the river. Such use is strictly in accord with the pilot rule. The Court would assume a serious responsibility were it to upset this practice of 40 to 45 years’ standing.

The authorities amply support the contentions heretofore made:

In *The Hustler*, 39 A.M.C. 998 (D.C.N.Y.), The “Hustler” passed through the bridge draw on its port

side of the narrow channel when the starboard draw was available for use. The Court, however, held that the course of "The Hustler" was justified upon the basis of a custom which in turn was based upon factors of safety. The Court said:

"* * * but the custom was for tows bound east, to pass through the north draw, as it was difficult for them to pass through the south draw, although such passage was possible, but dangerous.

"The canal, at the place in question, was a narrow channel, and the general rule is that in a narrow channel each vessel shall keep to her own starboard side. The narrow channel rule is not absolute, but applies only insofar as it is safe and practical. *Transfer No. 21*, 248 Fed. 459; *P. R. R. No. 35*, 1932 A.M.C. 779, 58 F. (2d) 170; *C. Gallagher*, 262 Fed. 97; *Felix Taussig*, 5 F. (2d) 612, 1925, A.M.C. 953.

"The evidence clearly shows that while on occasions the south draw of the Scotia bridge is used by tows bound east, it is not safe or practical, but must be used with great caution and is seldom used, except in cases of emergency."

In *The Komiles-Russell No. 4*, 35 F. Supp. 194 (D.C.S.D.N.Y.), the Court said:

"It is undisputed that there is a well recognized custom with respect to navigation in Hell Gate, in

the vicinity of Negro Point, which requires vessels to pass starboard to starboard on the flood tide.

“The main contention of the *Russell* tow is that the *Komiles* was attempting to pass port to port contrary to this custom. For the *Komiles* it is insisted that the *Russell* No. 4 was at fault for sounding a cross signal, and for not stopping and reversing her engines promptly.

“The navigation was in accordance with the custom in Hell Gate on the flood tide; * * * I think the *Komiles* was at fault for attempting a port to port passage. The established custom for the navigation of vessels in Hell Gate, in the vicinity of Negro Point, requires a starboard to starboard passage on the flood tide. This custom was proved at the trial, and is not disputed. It has also been recognized by a long line of cases in this circuit.”

Opposing counsel (App. Br. p. 22) says that the above “Hell Gate” cases are not in point because, as the name implies, the place “is an especially dangerous piece of water with a very sharp bend and extreme currents, and is governed by * * * the East River Statute”. Counsel’s distinction, however, is one of degree and not of kind. The significant fact is that because of factors of safety and practicability, the New York Courts did not in these cases apply the port to port passage rule.

Opposing counsel refers to *The Stephen R. Jones*, 27 F. (2d) 208 (App. Br. p. 21), in which the Court says:

“The local pilot custom on the lower Mississippi River is for the ascending vessel to come up under the points, in order to get the benefit of slack water, while the descending vessel runs the bends, keeping in or near the middle of the river, in the thread of the stream, to get the benefit of the current. This custom is of long standing, has received judicial sanction, and must be considered an exception to the pilot rules. *The Albert Dumois*, 177 U. S. 240, 20 S. Ct. 595, 44 L. Ed. 751; *The Esparta* (C.C. A.) 160 Fed. 289.”

In *The John D. Rockefeller*, 272 Fed. 67 (Cert. den. 266 U. S. 693), also cited by counsel (App. Br. p. 22), the Court said:

“The customs of the river are, of course, subordinate to the statutory rules and to the pilot rules; but, when not inconsistent with those rules, they should be observed for promoting both dispatch and safety, *and the violation of an established custom of this sort is attributed to a vessel as a fault.*” (Emphasis ours.)

“As all vessels navigating the Mississippi River should observe these rules and customs, navigators have a right to expect their observance by each other.”

Counsel attempts to distinguish the two above mentioned "Mississippi decisions" upon the ground that Article 25 is expressly omitted from the Mississippi Rules. It is true that Article 25, as such, was not involved in the Mississippi River cases, but in *The Stephen R. Jones* case, "The Jones" was held negligent "in failing to observe the starboard hand rule of the road to keep to the right". The quoted rule is substantially identical with Article 25. The same is true in the case of *The John D. Rockefeller*, *supra*.

In *Occidental, Etc. v. Smith*, 74 Fed. 261 (App. Br. p. 23), the Court disapproved an alleged custom for vessels entering the Golden Gate to take the north, or lefthand side, but significantly said:

"We cannot find in the testimony or argument of counsel any attempt to give a reason for the alleged custom."

In the instant case we have cited eleven reasons for the custom.

In *The Acilia*, 120 Fed. 455 (App. Br. p. 23), the vessel was held negligent for failure to stay on her starboard side of the fairway, but the Court said:

"and it was perfectly safe and practicable to obey the rule. * * * The testimony shows that there is no reason for such a violation of the rule."

Indeed, the Court also pointed out that there was no agreement among the pilots in respect to any variation from the rules.

In *The Booth*, 127 Fed. 453 (App. Br. p. 24), the primary question was whether the pilot rules, including Article 25, were in effect at the place of collision. Counsel relies upon the lower court's decision, which court did not find any actual existing custom based on safety or practicability. In the appellate court, however (see *The Booth*, 138 Fed. 303, 305) the Court used significant language:

“It is beyond the province of the courts to condemn a practice so notorious and so long continued that it must be presumed to be known to Congress and to the supervising inspectors, and yet has not been condemned by either of them.”

In the instant case the custom for river boats to use the east side of the river at Post Office Bar had existed for 40 to 45 years and, therefore, must presumably have been known both to Congress and the supervising inspectors and “yet has not been condemned by either of them.” The only attempt by opposing counsel to establish such condemnation concerned a hearing before the Local Steamboat Inspectors at Portland, involving a collision in 1938 between two motor river tugs, Tidepoint and Modoc, in which the issue of safety and practicability was not raised. Evidence in reference to the

Modoc was received by the Court herein subject to objection. Admittedly, no formal notification from the inspectors' office of the decision in *The Modoc* (irrelevant herein) was given to anyone other than the two pilots involved (R. 734, 737, 766).

In *The Transfer No. 10*, 137 Fed. 666 (App. Br. p. 24), the Court merely held that if the custom to use the port side of the fairway is based solely on convenience, it does not justify a departure from the usual rule; likewise, in *Lehigh C. & Nav. Co. v. Compagnie, Etc.*, 12 F. (2d) 337 (App. Br. p. 25), the Court said: "We do not think the custom proved * * *", and the discussion in the opinion is simply to the effect that custom, based upon convenience only, will not justify a departure from the usual rules.

We need, however, not leave the Ninth Circuit to find legal justification for the practice in the instant case. In *The Felix Taussig*, 5 F. (2d) 612 (C.C.A. 9th Circuit), a case with which opposing counsel is familiar because he was also counsel in that case, the facts were as follows:

The "Diamond-O", a river boat with oil barge in tow, was enroute downstream in the Columbia River approaching the river bend at Kalama, when she sighted the "Taussig", an ocean going steamer enroute upstream. The river boat went to the south, or its lefthand side of the river, entirely out of the dredged side of the

channel, both to give the ocean ship the entire channel and because if an attempt were made to pass port to port in the bend it would be hazardous by reason of the propinquity of certain municipal docks, a moorage ground, the course of the current, and the slippage which would result in making the turn. The "Taussig" also went to the south and a collision occurred. In the legal proceedings which followed the "Taussig" charged the "Diamond-O" with violation of Article 25 of the Inland Rules. Upon this issue the appellant court considered the testimony of expert pilots as justifying the conduct of the river boat and Master, and concluded that he was free from fault, saying:

"Although it is a close question, our best judgment is that under the facts it was not safe and practicable for the 'Diamond-O' to keep to the right side and pass 'The Taussig' port to port and, therefore, we think that the 'Diamond-O' was justified in undertaking to proceed contrary to the general requirements prescribed by Rule 25."

That starboard to starboard passages are not uncommon in the Columbia River has been judicially noted also in the case of *The Charles R. McCormick*, 20 F. (2d) 27 (C.C.A. 9th Circuit), cert. den. 275 U. S. 562, where the Court said:

"Signaling for a starboard passage in the lower reaches of the river was not uncommon."

PROXIMATE CAUSE

We believe from the great weight of the testimony that the "Barry K" had the right to be on the east side of the river at Post Office Bar at and before the time of the collision. Should the Court disagree with us, the fact remains that the position of the "Barry K" on the east side was a mere condition, not a cause of the collision.

Captain Norberg admitted knowledge of the custom of river boats, at least 50% of the time at night, to pass ocean going boats at this place starboard to starboard. He was therefore under a legal duty in the exercise of even the slightest care to know and expect that he might meet a river boat coming up the east side of the river. When Norberg first saw the "Barry K," the vessels were about a mile apart. During all of the time remaining before the collision occurred, they were in sight of each other. The distance between the vessels and the time elapsing while the intervening mile was covered, gave Norberg full opportunity to have avoided a collision. He did not do so because of his own obstinate determination to remain on the east side of the river.

In the early case of *The Britannia*, 34 Fed. 546, at 557, Mod. 42 Fed. 67, Orig. Decree Aff. 153 U. S. 130, the Court said:

"Aside from some special provisions making the non-observance of the statute in itself a ground of

liability, as in the British Act above referred to, the mere transgression of such a statute will not make the vessel liable where the disobedience of it *did not contribute to the collision*. And inasmuch as only the *proximate* causes of collision are deemed material, the mere fact that a vessel is on the *wrong side of the river does not* make her liable, *if there was ample time and space for the vessels to avoid each other by the use of ordinary care*. In such cases the cause of the collision is deemed, not the simple presence of the vessel in one part of the river rather than in another part, *but the bad navigation of the vessel, that, having ample time and space, might easily have avoided collision, but did not do so.*" (Emphasis ours.)

A violation of the East River Statute in New York (the statute having a similar purpose to Article 25) is not necessarily a fault creating liability as was held in *Syosset*, 71 F. (2d) 666:

"On the record before us we hold that the violation by the *Syosset* of the East River Statute was a '*condition*,' and not a *contributing cause* of the collision." (Emphasis ours.)

and also in *The No. 1*, 180 Fed. 969:

"We have heretofore had occasion to pass upon this and a similar statute, and to hold that violation of such statutory obligations is not a fault, if

it be only a *condition* and not a *cause of the injury* complained of. * * * We do not connect the Boody's violation of the statute causally with the accident." (Emphasis ours.)

Note the dissenting opinion of Circuit Judge Learned Hand in *The Penoles*, 3 F. (2d) 761:

"I agree that, though a vessel ignores the East River Statute, she is not at fault unless her position is a '*cause*,' and not a '*condition*' of the collision. *By that the books mean only this: That when the offending vessel has been seen in season, her position, though unlawful, is a fact with which all other vessels must reckon in their navigation.*" (Emphasis ours.)

Judge Hand had occasion to apply this principle in *The Ballhaven*, 72 F. (2d) 206, when he said:

"We have often held that if the offending vessel is visible by the other in time to shape her movements accordingly, and if she does not impede the other's navigation by her unlawful position, her fault has not contributed."

See also the *SS "Deutschland,"* 90 F. (2d) 454 (C. C. A. 2nd Cir.), a collision case. The Court said:

"The appellant argues that the *Deutschland* was on the wrong side of the channel as she was

proceeding, and therefore violated Article 25 of the Inland Rules * * * .

“But this violation would not have been followed by a collision if the Munargo had pursued the course which the situation required. In *The Bellhaven*, 72 F. (2d) 206, 207, where we held that the burden was upon the tug on the wrong side of the narrow channel to excuse herself for so navigating, we said: ‘We have often held that if the offending vessel is visible by the other in time to shape her movements accordingly, and if she does not impede the other’s navigation by her unlawful position, her fault has not contributed’.

“The *Deutschland*’s signals announced her intentions in navigating at a time when both vessels were approaching green to green. In *The California*, 250 F. 790, 792, we observed: ‘When a quarter mile apart the boats were on substantially opposite parallel courses, warranting a starboard to starboard passage, which the *McAllister* claimed, and the steamer did not accord. Therefore the latter is solely at fault’.”

Since Pilot Norberg of the “*Pennsylvanian*” first saw the “*Barry K*” a mile away, the movements of the tug being apparent thereafter, it was his own lack of care which insulated and made immaterial any conceivable fault created by the “*Barry K*’s” position in the river.

APPELLANT'S SPECIFICATION OF ERROR II.

(App. Br. pp. 29 and 30)

Appellant next charges that the trial court erred in not holding the "Barry K" and her barges negligently navigated in that the pilot was navigating the boat alone in the pilot house with the Master asleep—this proximately contributing to the collision.

ARGUMENT

Counsel cites no statute, pilot rule or judicial authority requiring a river tug to have more than one navigator in the pilot house. It is ridiculous to "contrast" the two vessels in respect to number of persons on each who were engaged in some phase of navigation. The tug was a river craft with a small crew. The "Pennsylvanian" was a large ocean going ship with a proportionately large crew and officer personnel. The "Barry K" did have two navigators, the Master and Pilot, but they served on different shifts. The "Pennsylvanian", even with the Master, Pilot and Third Officer on the bridge, Helmsman at the wheel, and the lookout forward was still so negligently operated as to cause the collision with the "Barry K".

Nothing in evidence suggests that the burden on Pilot Reed alone "to observe the approaching "Pennsylvanian", the ranges and shore beacons, determine his course, blow his whistles, listen for the "Pennsylvanian's", answer them, steer his ship and ring his sig-

nals to the engine room" (App. Br. pp. 29, 30) was anything more than a routine duty readily performed by a single pilot of 23 or 24 years' experience in handling river craft.

Reed had previously been Master of the "Barry K", but in December before the collision he had relinquished this place to Captain Williams merely because the latter was an older man with the Western Transportation Company and under Company rules had seniority rights over Reed (R. 99, 100, 163). There is nothing except counsel's dogmatic supposition to suggest that the "Barry K" would have been navigated differently if Captain Williams had been in the pilot house. The "Barry K's" whistle for a starboard passage was not surprising to Captain Williams (R. 166). He affirmatively testified that had he been in the pilot house, he, also, would have piloted the "Barry K" upon the east side of the channel (R. 180). If five men on the "Pennsylvanian" assisting in her navigation succeeded only in causing collision with the "Barry K", mere absence of numbers of men in the pilot house on the "Barry K" has no significance whatsoever.

APPELLANT'S SPECIFICATIONS OF ERROR III TO VIII, BOTH INCLUSIVE.

(App. Br. pp. 31-45)

Although the above specifications of error aggregate six in number, they really present in different forms

and with corollaries the contention that the trial judge erred in holding that the "Pennsylvanian" did not stop her engines at the first danger signal from the "Barry K".

ARGUMENT

Counsel says "what confused the trial judge (in reaching the conclusion that the "Pennsylvanian" did not stop her engines at the first danger signal) was a conflict in Pilot Norberg's testimony" (App. Br. p. 32). Actually the only "confusion" involved was that on the part of Norberg—confusion which started when he was piloting the "Pennsylvanian" past Post Office Bar, and which remained with him on the witness stand. As the trial judge in his "Memorandum of Decision" (R. 40) said:

"The pilot of the 'Pennsylvanian' claimed in his corrected testimony that he ordered full astern on hearing the first danger signal, but the circumstances of the case persuade me that he did not take this action at the time stated."

In considering the circumstances of the case it is instructive to start with the testimony of Norberg himself. Norberg told several different and conflicting stories in respect to the stopping and reversing of the engines on the "Pennsylvanian". In the first place on direct examination Norberg testified: (R. 467, 468.)

"Mr. Wood: Q. Who blew the whistle on the Pennsylvanian?

A. I did.

Q. The tug at that time was showing her red light?

A. Showing the red light. And slowed down, half speed; then we got the danger signal from the tug, a group of short blasts and couldn't tell how many it was, they was coming too fast, too close together. Then we stopped and we got another group of signals and I ordered full astern."

Here Norberg said the "Pennsylvanian" slowed at the "Barry K's" red light, stopped at its first danger signal and went full astern at the second danger signal.

Subsequently and still on direct Norberg testified: (R. 475.)

"When did you answer that one blast?

A. Oh, about half a minute, less than that; ten seconds after I heard the blast, after we had conferred.

Q. After you had conferred?

A. Yes.

Q. Now, when you answered that one blast, did you get an immediate response from the 'Barry K'?

A. No, not right away.

Q. But sometime later you got what?

A. I got a group of blasts.

Q. And what did you do then?

A. I slowed down.

Q. And then what?

A. And held my course along the land there and stopped."

Here Norberg said he slowed down at the first group of blasts, stopping later. Continuing with direct, Norberg testified:

(R. 476, 477)

"Q. How close were you to her when you were forced to the conclusion she was not going to swing back on her course but that there was some danger of collision?

A. About 800 feet or more perhaps.

Q. Then what did you do?

A. Full astern."

Here Norberg had the vessels 800 feet apart when he gave the order full astern.

On cross-examination Norberg testified: (R. 513, 514)

"Q. Now, at the time that you heard this first group of blasts from the 'Barry K', how far was the Pennsylvanian from her?

A. Well, I guess a couple of thousand feet anyway.

Q. A couple of thousand feet?

A. Yes, all of that.

Q. At that time what orders did you give?

A. Either half speed or stop.

Q. Did you give the orders for half speed or stop at that time?

A. Half speed or stop, I said.

Q. Which did you do?

A. Well, we will call it half speed, then.

Q. Call it half speed."

Here Norberg wasn't sure whether at the first group of blasts from the "Barry K" he gave the order half speed or stop, but oscillated in favor of half speed.

Note that in this last quoted testimony, Norberg heard the first group of blasts when the vessels were "all of" 2,000 feet apart. Compare this estimate with that of Captain Reed who approximated the distance at 2,500 to 3,000 feet (R. 114). Elsewhere Norberg said he was "a good half mile or more" from the "Barry K" when he "started to slow down" (R. 507).

Norberg's testimony, above quoted, was completed Friday, July 18, 1941 (R. 462, 556). On Tuesday, July

22nd, obviously after consultation with counsel, Norberg gave his so-called "corrected testimony" as follows: (R. 700, 701)

"Q. Captain Norberg, in my going over the transcript of your testimony the other day, I noticed you testified that at the time you received the first danger signal from the 'Barry K', you put your engines at half speed and stopped and I want to ask you if that testimony is correct?

A. No. I had the engines stopped before that, when she showed the green light and when I saw the danger signal —

Q. What is the correct testimony; what are the facts about that? When you saw the green light of the 'Barry K' first, what did you do with your engines at that time?

A. Half speed and stop.

Q. That is when you saw the green light first?

A. Yes.

Q. Then when you received the first danger signal from the 'Barry K', what did you do with your engines?

A. Full astern."

Counsel (App. Br.p. 34) says:

"The real truth is that the 'Pennsylvanian's' en-

gines were stopped as a precaution when the 'Barry K' first showed her green light."

Yet in his "corrected" testimony Norberg first said it was "when she showed the green light *and* when I saw the danger signal". (Italics ours.) Counsel then interrupted Norberg to ask the same question in relation to the green light, omitting reference to the danger signal. After all this effort, the "corrected testimony", above set forth, was finally adduced.

The above quoted separate portions of Norberg's testimony are convincing because of their confused and contradictory nature. Counsel apologizes for "Norberg's mistaken testimony, later corrected by the witness himself" (App. Br. p. 44). Nevertheless, we believe it clear that Norberg's testimony at the trial merely reflected his own uncertain actions while at the pilot wheel of the "Pennsylvanian".

Reliance is placed by opposing counsel on the joint report made by Norberg and Vaux to the United States Steamboat Inspectors on the day of the accident (App. Br. p. 35). This report—obviously a studied one—asserts that when the "Barry K" showed her green side light, she was still far enough away to resume her port to port passage. Although at least Captain Vaux at that time saw "nothing to become alarmed about" (R. 574), nevertheless, the report says: "We slowed to half speed and stopped." Moreover, neither the report nor

the bridge bell book referred to therein shows the distances which the vessels were apart during the various stages when they were in sight of each other before the collision.

Opposing counsel seeks to bolster the unsatisfactory testimony of Norberg by that of the "clear and accurate witness" Vaux, corroborated by Third Officer Nelson, the substance of whose testimony was that the ship's engines were stopped when the "Barry K's" green light first appeared and were later reversed immediately on receipt of the "Barry K's" danger signal. This "clear and accurate" testimony was checked against the "Pennsylvanian's" bridge bell book.

The entry in that book for slowing and half speed was 12:54 A.M. (R. 587). The entry for the time of collision was 12:55 A.M. (R. 587). Taking these items at face value, it would appear that from the time slowing of the "Pennsylvanian" began until the collision only one minute elapsed. Somewhere in that interval the "Pennsylvanian's" engines are said to have been reversed (R. 587, 588).

But Norberg and Vaux were extremely careful to point out not once but repeatedly that "the bell book is only to the nearest minute" and "although the collision is recorded * * * to the nearest minute, at 12:55, the interval between reversing full speed astern, rudder hard right, and the collision was considerable" (R. 588).

Thus, the period between the slowing down and collision was stretched, as the trial Judge noted, to "within less than two minutes" (R. 706, 707). Under all the circumstances, however, it is not credible that the transaction occurred in only a minute of time or even "within less than two minutes".

The "Pennsylvanian" on coming in sight of the "Barry K", according to Norberg, was proceeding at seven knots (approximately eight miles) (R. 508), the "Barry K" at six miles per hour (R. 116). The vessels thus approached each other at a combined speed of approximately fourteen miles per hour. If these speeds had remained constant to the collision, the vessels would have cut down the intervening distance at the rate of 21 feet per second or 1,260 feet per minute. If the vessels were a mile apart (5,280 feet) when they first came in sight of each other, four minutes and twelve seconds would have elapsed before the collision.

But allowance must be made for the fact that their speeds were not constant. Within the last thousand feet the "Barry K", according to Reed, cut its speed from six miles per hour to "almost a complete stop" (R. 116, 118). The "Pennsylvanian's" speed throughout some indeterminate distance between a fourth of a mile and 2,000 feet or more before the collision (R. 513, 514, 559) was reduced from seven and one-half or eight knots to three and one-half or four knots, according to Vaux, or to "a little headway", according to Norberg (R. 514,

580). It is obviously impossible to compute accurately the elapsed time by making allowance for slowing, but it is apparent that the overall time substantially exceeded four minutes and twelve seconds, the lengthening of that time occurring during the latter part of the passage.

Norberg said he heard the first group of blasts, that is, the first danger signal from the "Barry K" when it and the "Pennsylvanian" were "a couple of thousand feet anyway" apart (R. 514). If, during that 2,000 feet or more of distance, the average combined speeds of the vessels approaching each other were assumed to be half their previous speed, say seven miles per hour, then they approached each other at twelve feet per second, or 720 feet per minute. On this assumption three minutes would have been required for the vessels to come together within that 2,000 feet of distance.

However, the "Pennsylvanian's" bell book fixed the interval of time between the "Pennsylvanian's" slowing down and the collision at one minute, or, according to the corrected testimony, "less than two minutes". Thus, if the bell book governs, the signals for half speed or stop were not given at the time Norberg saw the "Barry K" 2,000 feet or more away, but at some later time. According to Reed, the vessels were 2,500 to 3,000 feet apart when he sounded the first danger signal. Adopting this testimony in light of the bell book entries would induce the conclusion that the "Pennsylvanian" did not stop for an even greater

period of time after the "Barry K's" first danger signal was blown. It is, accordingly, not difficult to understand why the trial judge, who observed the demeanor of the witnesses upon the stand, the confusion and uncertainty of Norberg, the studied, careful explanations of Vaux, and the contradictions of Norberg even after a week-end of study with counsel, was persuaded by the circumstances of the case that Norberg did not order full speed astern "at the time stated", namely, when he received the first danger signal from the "Barry K". Indeed, the "Pennsylvanian" did not at that time even stop. The record amply supports the finding of the trial court upon this subject.

APPELLANT'S SPECIFICATION OF ERROR IX.

(App. Br. pp. 28 and 29)

Appellant charges that the trial court erred in failing to hold that the "Barry K's" "persistence in keeping on the lefthand side and failing to stop or reverse her engines when she knew the dangerous situation had arisen" was a fault for which the "Barry K" should alone be responsible. We reserve argument upon this subject until consideration *infra* of Cross-Appellant's Specification of Error I, which involves the same subject matter.

CROSS-APPELLANT'S SPECIFICATIONS OF ERROR

We assume the subject matter of this litigation has now been sufficiently covered that no "Concise Abstract or Statement of the Case" is either necessary or proper in respect to the cross-appeal. We, accordingly, merely set forth the Specifications of Errors on which cross-appellant relies, which specifications are the same as those stated in its Assignment of Errors (R. 75-77) and in its Statement of Points (R. 904). Cross-appellant assigns errors in the proceedings, decision and decree of the trial court as follows:

"1. In holding that there was negligent handling of the 'Barry K', constituting a proximate cause of the collision in that it failed to stop engines when the 'Barry K' blew the first danger signal.

2. In holding that Western Transportation Company should pay one-half the difference of the damages sustained by the 'Barry K' and 'Pennsylvanian'.

3. In holding that American-Hawaiian Steamship Company should recover by way of recoupment one-half the amount which American-Hawaiian Steamship Company was required to pay cargo on Barges Nos. 22 and 24.

4. In holding that American-Hawaiian Steamship Company should recover from Western Transportation Company any damages whatsoever.

5. In requiring Western Transportation Company to pay its own costs.

6. In failing to hold that the 'Barry K' was carefully navigated at all times; that it was free from fault, and in not entering decree in favor of Western Transportation Company accordingly.

7. In failing to hold that the 'Pennsylvanian' was solely at fault in respect to the collision.

8. In failing to hold that the 'Pennsylvanian' was at fault in not giving proper or any heed to the several whistle signals by the 'Barry K' for a starboard passage, and that this proximately caused the collision.

9. In failing to hold that the 'Pennsylvanian' was at fault in crossing the starboard passing signal of the 'Barry K' with port passing signal, which circumstances proximately caused the collision.

10. In failing to hold that the 'Pennsylvanian' did not ascertain the position of the 'Barry K' or take steps to avoid the collision, thus proximately causing same.

11. In failing to hold the 'Pennsylvanian' at fault in not changing her course to port, but continuing to starboard and toward shallow water, and that she thereby proximately caused the collision.

12. In failing to hold that under all circumstances then present the 'Pennsylvanian' was proceeding at an immoderate rate of speed and thereby proximately caused the collision.

13. In failing to hold that the 'Pennsylvanian' was at fault in not using the open and available main ship's channel at and before the time of the collision, thereby proximately causing the same.

14. In failing to hold that the 'Pennsylvanian' was at fault in not having available a competent person to drop the anchors, and in failing to drop the anchors, thereby proximately causing the collision.

15. In failing to decree recovery by Western Transportation Company from American-Hawaiian Steamship Company of Western Transportation Company's entire damage." (R. 75-77)

CROSS-APPELLANT'S ASSIGNMENT OF ERROR I.

(R. 75)

The trial court erred in holding that there was negligent handling of the "Barry K", constituting a proximate cause of the collision, in that it failed to stop engines when the "Barry K" blew the first danger signal.

The foregoing is the only finding by the trial court of negligence on the part of the "Barry K". If the Court agrees with our view that this finding was in error, and that the "Barry K" was not otherwise at fault, but sustains the trial court's finding of fault on the part of the "Pennsylvanian", then it would appear that Cross-Appellant's Assignments of Error II, III, IV, V, VI, VII and XV should be sustained. In other words, upon the assumption stated, the last cited assignments follow as corollaries to a reversal of the finding referred to in Assignment I. No further argument will be presented in respect to the other assignments just mentioned. Discussion of Cross-Appellant's Assignment of Error I includes Appellant's Specification of Error IX.

ARGUMENT

We have pointed out that the mere presence of the "Barry K" on the east side of the river was a condition not the cause of the collision. It follows that the movements of the vessels thereafter are the only factors properly to be considered in determining what was the proximate cause of the collision. The question then is: Did the "Barry K", after seeing the "Pennsylvanian", adopt a course which can be said to have constituted a fault?

When it appeared that the "Pennsylvanian" was making no immediate effort to swing to its port side of the stream, Captain Reed was faced with one of three choices: First, stop quickly as possible; second, attempt to cross the bow of the "Pennsylvanian" and proceed to the "Barry K's" west side of the stream; third, get into the shallow water on the "Barry K's" east side as quickly as possible and out of the path of the ocean going ship.

To stop immediately involved hazards. After such stop, the "Barry K" would probably have still been in the path of the "Pennsylvanian", which Reed said appeared to be moving twice as fast as the "Barry K" (R. 120). When stopped, Reed would not have had the same control over his tug and barges that he would have had underway. There were the current of the river and the east cross wind to be considered. Actually Reed did stop, or almost so, before the collision, but the

"Pennsylvanian" hit the starboard side of the leading barge just the same. (R. 469).

To cross the bow of the "Pennsylvanian" was likewise hazardous. The "Barry K" was already well over on the east side. A sharp swing to her starboard would have been necessary. Based upon his 24 years' experience, Reed had every reason to suppose that the "Pennsylvanian" would ultimately swing to her own west side of the river—as ocean going vessels invariably did when passing upbound river tugs with barges or tows.

To get into shallow water on the east side as quickly as possible seemed and was the sensible course. Captain Reed could not know what the approaching steamer drew, or how heavily laden she might be, but obviously she was a large ship and might well draw 25 to 30 feet or more. He rightly assumed the "Pennsylvanian" would at least remain in the channel. Clearly Norberg intended to remain in the channel (R. 494-497). By "channel", he meant the 35 foot channel, the east edge of which was 400 feet from shore (R. 495, 497). No deep sea vessel "goes up there", but a light draught river boat could proceed through that 400 feet of water in entire safety to itself (R. 497). The point of collision was only 200 feet from the east bank. Vaux said: "I still wonder why the "Pennsylvanian" didn't go ashore because the trees were visible there of the shore line." (R. 550) That the "Pennsylvanian" did not actually go ashore is undoubtedly explained by the fact that instead of drawing her maximum of 29

feet, she was drawing at the time only 15 feet forward and 19 feet aft (R. 466). Norberg had the entire 35 foot ship channel to his left, but he went to his right. Reed testified:

“Q. Will you state to the Court why, after you gave your first danger signal to the Pennsylvanian, you did not stop your engines and throw them in reverse immediately?

A. Well, I was giving two whistles first, the danger whistle, and another two whistles, which I gave several, figuring any moment he would understand the two whistles, he would swing back into his regular course and proceed on down to my starboard side.

Q. Had he done so, would there have been any reason for a collision?

A. No sir.

Q. And proceeding over toward the east side, where were you going with reference to the channel?

A. I was going directly away from the channel, to the east side of the channel.

Q. And in that particular area of the river, could heavy-draft vessels travel?

A. They did right at that place, but not farther where I was trying to get.” (R. 122, 123.)

True, Captain Reed on cross-examination said that he did not get to the place he aimed to reach in order to be safe (R. 123), but this testimony was based upon facts which he learned after the accident and not the facts which he was obliged to consider just before the accident. He reasonably believed that the "Pennsylvanian" could not reach him when the "Barry K" was 200 feet from the east edge of the river.

Counsel says: "It needs no precedents of decided cases to condemn such conduct as this and we cite none." (App. Br. p. 29) Actually, the case of *The Felix Taussig*, supra, not only does not condemn such conduct, but in that case the river boat was exonerated from blame in following a course similar to that adopted by Captain Reed. The Court said: (5 F. (2d) 615, at pages 614 and 615.)

"At once, then, the practical situation became this: The Diamond-O, about to leave the channel, had signaled by two blasts that she intended to pass to starboard, instead of port, but got no assent or signal of any kind. What ought the Diamond-O to have done? Persisted in her course over into the shoal water, supposing that the Taussig would approach in the channel, or repeated signals and made certain that the Taussig had heard and understood? The answer is, as a precautionary act, she ought to have repeated her signals. *The Victory*, 168 U. S. 410, 18 S. Ct. 149, 42 L. Ed. 519; *The Three Brothers*, 170 F. 48,

95 C. C. A. 322. But, though the Diamond-O may be criticized for not taking that precautionary measure, still, if it appears that her action in that respect did not contribute to the result, and that the immediate sole cause of the collision was negligence on the part of the Taussig, then the Taussig, and not the Diamond-O, should be held liable.

“The evidence is that the two blasts of the Diamond-O were heard by the lookout of the Taussig, and that at that time the Taussig was just below the bend, commencing to swing on the ranges, probably a few feet off; her green light showing to the Diamond-O, and the pilot of the Taussig observing the side lights of the Diamond-O. At that time the vessels, by evidence and chart markings, must have been at least half a mile apart. Therefore, if the Taussig had obeyed the two whistles blown by the Diamond-O and heard by the lookout, there would have been no collision, for she would have kept to the dredged channel, while the Diamond-O, keeping her course, passed out of the dredged channel to the shoal water.”

In *The Taussig* the Court says that when the “Diamond-O” “persisted in her course over into shoal water” on her left, she was subject to criticism for not taking the precautionary measure of repeating her two blast signal. Nevertheless failure to repeat this signal was said not to have contributed to the result. Reed, however, did repeat the two blast signal, not once, but twice (R. 123).

Moreover, Reed said the "Pennsylvanian" blew only two whistle signals. The first was the "Pennsylvanian's" one blast in answer to the "Barry K's" initial two—this when the vessels were 2,500 to 3,000 feet apart (R. 114). The second whistle from the "Pennsylvanian" was a reverse engines signal of three blasts when the vessels were approximately 1,000 feet apart (R. 117). At that point of time Reed said: "I immediately reversed my engines full speed and blew three whistles." (R. 117) Just before reversing, the vessels being a little over 1,000 feet apart, Reed had stopped his engines (R. 116). By the time the collision occurred the "Barry K" and barges "had come substantially to a stop" (R. 118).

We submit that under all of the circumstances and conditions which then faced Reed, he acted with reasonable prudence in the course which he adopted, and that the trial court's finding of fault was in error.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR VIII.

(R. 76)

The trial court erred in failing to hold that the "Pennsylvanian" was at fault in not giving proper or any heed to the several whistle signals by the "Barry K" for a starboard passage and that this proximately caused the collision.

ARGUMENT

Reed first saw the two white mast lights of the "Pennsylvanian"; shortly afterwards he saw her star-board light and knew she was coming down on the Post Office Range (R. 112). Then, according to Reed, substantially corroborated by John Kelly (R. 448), followed a series of whistle blasts at distances which may for convenience be tabulated as follows:

WHISTLE SIGNALS	Approximate Distance Between Vessels.
"Barry K" sounds two blasts.	3000 to 4000 feet (R. 113,125)
The SS "Pennsylvanian" ten seconds to half a minute later (R. 475) answers with one blast.	
"Barry K" sounds four blasts, eight or ten seconds after the "Pennsylvanian's" one blast. No answer.	2500 to 3000 feet (R. 113,114,125)
"Barry K" sounds two blasts. No answer.	2000 to 2500 feet (R. 115)
"Barry K" sounds four blasts. No answer.	2000 feet (R. 115)
"Barry K" sounds two blasts and stops engines.	1000+ ft. (R. 116)
SS "Pennsylvanian" sounds three blasts.	1000 feet (R. 117)
"Barry K" reverses engines and sounds three blasts.	Less than 1000 feet (R. 117)

It will be observed that the distance the vessels were apart had been cut down by about 1,000 feet between the "Barry K's" two blast signal and its first four blast or danger signal (R. 126). At speeds of eight and six miles respectively for the ship and tug, it required 47 seconds to close this interval. The subsequent interval between the "Barry K's" first danger and second starboard passing signal was 500 feet, traversed in about 23 seconds; similarly as to the interval between the "Barry K's" second passing and its second danger signal. Next was an interval of 1,000 feet before the third starboard passing whistle by the "Barry K". It was during this period that the vessels were slowing down so that what otherwise would have been a 47 second interval to cover the last mentioned thousand feet was extended substantially.

If, therefore, those on the "Pennsylvanian" were mistaken as to the nature of the "Barry K's" first passing whistle, they could not have been mistaken as to the second or third passing whistles with substantial intervals between and blown at times when the vessels were approaching within easier hearing distance of each other. The identical starboard passing whistles repeated three times should by repetition have meant something to Norberg and the members of his "huddle".

But counsel says:

" * * * it is quite apparent that what he (Reed) blew was a confused rapid succession of blasts.

Nobody seems clear as to how many there were.”
(App. Br. p. 49.)

Nobody? What about Reed and Kelly? Lookout Swearingen on the “Pennsylvanian” made no claim of being unable to distinguish the whistles from the “Barry K”. He heard whistles from both ships, but said he simply didn’t remember what the whistles on either vessel were (R. 770). Even Norberg identified the “Barry K’s” second signal as a “group of blasts” consisting, as he said, of five or six blasts which he understood to be a danger signal (R. 513). He similarly identified the second “group of blasts” as a danger signal (R. 516, 517). He should have had no difficulty identifying the two blast signals for a starboard passage.

It may be, as counsel says, that “the whole twelve of them (if, as claimed, they were 4 and 2 and 4 and 2) could easily have been blown in less than ten seconds” (App. Br. p. 50). But if they had been, the approach which for the last 3,000 to 4,000 feet obviously consumed over four minutes, would have been characterized by silence and not by a “confused rapid succession of blasts”.

The “Pennsylvanian’s” disregard of the three starboard passing whistles by the “Barry K” was obviously a factor proximately contributing to the accident.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR IX.

(R. 76)

The Court erred in failing to hold that the "Pennsylvanian" was at fault in crossing the starboard passing signal of the "Barry K" with a port passing signal, which circumstance proximately caused the collision.

ARGUMENT

Although the trial court's finding of negligence on the part of the "Pennsylvanian" was failure to stop her engines when the "Barry K" blew its first danger signal (R. 55), the fault of the "Pennsylvanian" really began at an earlier point of time. It is conceded that when the vessels were about three-fourths of a mile apart, the "Barry K" gave a whistle signal to the "Pennsylvanian"—the issue of fact being whether that signal was one blast for a port to port passage or two blasts for a starboard to starboard passage.

Obviously a determination of this issue is important since if the first signal by the "Barry K" was two blasts, the "Pennsylvanian's" answering signal, which admittedly was only one blast, violated Article III of the Pilot Rules (See *infra*) which forbids "cross signals", that is, "answering one whistle with two and answering two whistles with one". The duty of the "Pennsylvanian" on receiving the "Barry K's" two blast signal was either to respond with two blasts, thus

acceding to the request for a starboard to starboard passage, or, if she did not understand the signal or declined to accede, she should have blown a danger signal of at least four short blasts. See Rules II and III, Pilot Rules Act of Congress, approved June 7, 1897 (Exhibit 8, pp. 6 and 7).

The great weight of the testimony supports the statement of Captain Reed that his initial signal was two blasts for a starboard to starboard passage. Reed blew these blasts and, therefore, was in the best position of anyone to know the nature thereof (R. 112). The Master of the "Barry K", although in bed, heard the two blasts (R. 166). The watchman, John Kelly, on the "Barry K" heard them (R. 446); likewise as to deckhand John H. Williams (R. 388). The Mate, Raymond Peck, heard the starboard passing whistles, although he didn't remember "what rotation they were in" (R. 379). Louis E. Fowler—the only wholly disinterested witness—Captain of the Shaver Transportation Company's tug "Cruiser" which was following the "Barry K" over a mile downstream, "heard the 'Barry K' blow two whistles" (R. 431).

The probabilities favor the accuracy of the testimony just cited. In view of the custom for river boats to make starboard passages with ocean going ships off Post Office Bar, there would have been no object in Captain Reed signaling for other than a starboard passage.

Opposing counsel says the "unanimous testimony" of those on the "Pennsylvanian" was that they heard only one blast (App. Br. p. 46). This statement is not accurate. The Quartermaster at the wheel of the "Pennsylvanian" was not called as a witness, nor did opposing counsel obtain his deposition. Neither was Wayne Swearingen, the lookout on the bow of the "Pennsylvanian", called to the stand or his deposition taken (R. 768). There is, however, before the Court the fact that three days after the accident Swearingen testified before the Local Steamboat Inspectors that he didn't remember whether the first signal from the "Barry K" was one or two blasts (R. 770). It is important that this lookout, whose position on the "Pennsylvanian" was 200 feet forward of the bridge (R. 523), did not corroborate the statements of Norberg, Vaux and Nelson that the first whistle they heard was one blast.

Serious doubt is cast on the credibility of Norberg in respect to his testimony that the first signal from the "Barry K" was one blast of the whistle (R. 467). Before the Steamboat Inspectors Norberg was asked: "When you heard that one blast of the whistle, did the Third Mate mention it to you?" Norberg replied, "Yes" (R. 491). But at the trial of the instant case Norberg testified that in accordance with a customary rule on American-Hawaiian ships "I asked the Captain * * * was that one blast?" The Captain said, "Yes". "I also asked the Third Officer 'Did you hear that there was one blast?' 'Yes', he said." So, it was Norberg who

asked the question, not the Third Mate who volunteered the information (R. 475).

A curious sort of "customary rule" this! Remember there was no fog being encountered—no storm, nothing to suggest the necessity of requiring the pilot to confer with other bridge officers to obtain confirmation of what the pilot heard—that is, nothing except doubt in the mind of the pilot which he, of course, denied (R. 475). This "huddle" practice seems to have been peculiar to American-Hawaiian ships. Norberg, who had worked for only one other company, the Luckenbach (R. 483), didn't remember any such practice with the Luckenbach (R. 489). True, Henry C. Dyer, who incidentally had never piloted any kind of a vessel on either the Willamette or Columbia Rivers, thought that confirming whistle signals was customary on any ship—but this was only an expression of opinion, not a statement of fact (R. 730).

"The vagaries of sound" which counsel says are "well known" (App. Br. p. 47) were clearly not vagaries to those on board the boat from whose whistle the sounds were emitted. If those on the "Pennsylvanian's" bridge failed to hear them correctly, it was not because they were not blown correctly. As between the positive testimony of those who said they heard two blasts of the "Barry K's" whistle, this being the testimony of the only disinterested witness Fowler, and the negative testimony of those who heard only one blast, the former should be taken in preference to the latter for it is posi-

tive against negative testimony. See *The Finn-McCool*, 147 Fed. 123; *The Winecco*, 39 F. (2d) 970, aff. 48 F. (2d) 1076. Moreover, the important issue is not what the officers of the "Pennsylvanian" say they heard, but what those officers in the reasonable exercise of their auditory senses ought to have heard. *The G. V. Luckenbach*, 197 Fed. 888, 892. *The Texas*, 226 Fed. 897, 903. Clearly they were at fault and that fault contributed to the accident.

Opposing counsel cites *The Gerry*, 161 Fed. 413, 418 (App. Br. p. 47), in support of the contention that where the vessel proceeds contrary to the narrow channel rule, it takes the risk of her signals not being heard. This contention applied to the instant case begs the question, for the "Barry K", as above pointed out, was not violating the narrow channel rule, but rather was proceeding in accordance with that rule, for within the meaning thereof it was neither safe nor practicable to make a port passage.

CROSS-APPELLANT'S ASSIGNMENTS OF ERROR X, XI, XII, AND XIII.

(R. 76)

These assignments will be considered together because they all relate to movements of the "Pennsylvanian" which proximately caused the collision: Failure to ascertain position of the "Barry K", continuing to

starboard instead of to port, immoderate speed, and failure to use the open and available main ship's channel.

ARGUMENT

Extended argument at this point would involve unnecessary repetition. We make only the following observations:

1. Counsel says: (App. Br. p. 6)

“It is not possible for a steamer in the ‘Pennsylvanian’s’ position to tell at that distance (approximately a mile) which side of the slightly curving river the upcoming boat is on.”

Contrary to counsel’s further contention, the “Pennsylvanian” had no right to assume that the upcoming boat would take the right side—if the boat were a tug, particularly with tow, because of the custom heretofore detailed. Knowing the approaching boat was a tug with tow, Norberg also knew there was at least a fifty-fifty chance that it would come up the east side of the river. Therefore, it was Norberg’s duty to ascertain the position of the “Barry K” in order to avoid possible collision. Although there is no evidence that the “Barry K” in fact took a sheer, both Norberg and Vaux on seeing the “Barry K’s” green light supposed she had taken a sheer, but would “right herself” and pass port

to port (R. 476, 546). The "Pennsylvanian", being uncertain of the position or intended maneuver of the "Barry K", was not at liberty to maintain its course and speed. Even in the case of an admittedly "privileged vessel", such vessel has no absolute right to keep her course and speed regardless of the danger involved; there is never a "right of way into collision". *Postal Steamship Corporation vs. SS. El Isleo*, 308 U. S. 378; 84 L. ed. 335. (See addenda infra.) The "Pennsylvanian" never gave a danger signal to the "Barry K"—only a reverse engine signal when the vessels were about a thousand feet apart (R. 117).

2. If the Court is satisfied that the passing signals given by the "Barry K" were for starboard and not port passing, then while the vessels were still 3,000 to 4,000 feet away, the "Pennsylvanian" was on notice of what the "Barry K" proposed to do—an intention not changed because the same signal was repeated three times. Moreover, the "Barry K" was showing her green light (R. 476, 546) for an appreciable length of time—indicating that she was heading farther toward the east side of the river. Reed said he was continuously bearing to the east side (R. 114, 116). All the facts before the "Pennsylvanian" indicated that the "Barry K" intended a starboard passage—yet the "Pennsylvanian" failed to alter her course to port, but continued to starboard toward the trees on the east bank.

3. Just after leaving the city limits, the "Pennsylvanian" increased her speed above her previous rate of

four knots. This was when Norberg first saw the "Barry K" a mile away (R. 506). He continued for a minute or two, gaining perhaps three or four miles per hour. At full speed he would have attained twelve knots (R. 506, 507). He well knew that it was important to reduce his speed back to three or four knots in order not to break the lines on the "Barry K" when passing her (R. 508). Yet he continued full speed ahead for a "good half mile or more" (R. 508). It being night and Norberg professedly uncertain of the intended course of the "Barry K", the speed of seven to eight knots while approaching the "Barry K" was immoderate under the circumstances.

4. The entire main channel was at the "Pennsylvanian's" immediate left. Only shoal water was to be anticipated on the right, yet the "Pennsylvanian" failed to use the open and immediately available main ship channel.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR XIV.

The trial court erred in failing to hold that the "Pennsylvanian" was at fault in not having available a competent person to drop the anchors and in failing to drop the anchors, thereby proximately causing the collision.

ARGUMENT

The stopping of a vessel is by no means wholly a matter of stopping and reversing her engines. In an emergency the dropping of an anchor may well avoid the collision which the operation of the ship's engines alone fails to avoid.

Admittedly the "Pennsylvanian" was equipped with two anchors on her forecastle head (R. 510). Admittedly those anchors were in physical condition to be used that night (R. 510). Admittedly if someone had been on the forecastle head in charge of the anchors and had received orders to drop the same it would have been possible for him to "get it out right away" (R. 512) or within "probably half a minute" (R. 852).

But it is also a fact that there was no one on the forecastle head in charge of the anchors at the time. To have someone there would have required as a preliminary matter calling a man out of his quarters and having him walk or run about 200 feet along the deck to the anchors—a process requiring four or five minutes (R. 512). Significantly, the Chief Officer, who would have handled the anchors, had been on the forecastle head while the vessel was still in the city limits, but was dismissed about five minutes before the collision occurred (R. 550). The ship's officers were careful to exercise ordinary precautions in this regard as far as the city limits—thereafter they were willing to take

their chances, and this notwithstanding Norberg's admission that he had to allow for the contingency of accidents (R. 510).

With no one on the forecastle head in charge of the anchors it would no doubt have been futile for Norberg to have ordered the anchors dropped. He gave no such order at any time (R. 512) and the anchors were not dropped. While we are aware of no statutory requirement that vessels operating in narrow channels shall be prepared at all times to drop their anchors, yet that this is a customary and proper precaution to be taken in the handling of large ocean going ships in confined spaces is established by the testimony. Use of this precaution is referred to in reported collision cases. See *SS. "Deutschland"*, 90 F. (2d) 454, 455; *The Texas*, 226 Fed. 897, 901.

If there had been a qualified man on the forecastle head who could have dropped the anchor immediately upon timely command from the bridge, the collision would probably have been avoided. The "Pennsylvanian's" officers said the ship was traveling at seven to eight knots per hour before her engines were stopped or reversed (R. 508, 579). Proceeding downstream at seven knots without dropping anchors, the ship could, from the time her engines were put in reverse, have stopped in approximately one-half mile (R. 508, 850). If, however, at the time the engines were put in reverse, the anchors had been promptly dropped, a ship of the

"Pennsylvanian's" class would, according to Captain Lowery, have stopped in one-half the distance, that is, in one-fourth of a mile (R. 850). Likewise, according to Captain Lowery, if the "Pennsylvanian" had been traveling four knots an hour, from the time her engines were put full speed astern, she could have stopped in half the distance required if the anchors were not used (R. 851). Captain Orwin G. Graham, who had piloted American-Hawaiian ships for three or four years, during which time he had to the best of his knowledge piloted the "Pennsylvanian", substantially corroborated Captain Lowery (R. 850, 851). It is further to be noted that if the port anchor on the "Pennsylvanian" had been dropped, the tendency would have been to pull the vessel to port (R. 854) and thus have assisted in diverting her from the starboard course which ultimately resulted in the collision.

As stated, Norberg said the "Pennsylvanian's" maximum speed before the accident was seven knots (R. 508). He started to slow down when the "Barry K" was "a good half mile or more away" (R. 508). He said he heard the first group of blasts (the first danger signal) when the two boats were "all of" 2,000 feet apart (R. 514), at which time he gave the order for "half speed" (R. 514). (This statement was subject to Norberg's "corrected testimony".) At the time of the collision, according to Norberg, the "Pennsylvanian" had a little headway—"She wasn't moving very fast" and she was "swinging away from" the "Barry K" (R. 515). If the "Penn-

sylvanian" had received "a little" assistance from dropping of the port anchor, it is demonstrably clear that the forward movement of the "Pennsylvanian" would have been at least retarded enough that she would have stopped or veered to port and have avoided the collision. Captain Vaux put the "Pennsylvanian's" maximum speed at seven and one-half or eight knots, with the speed reduced at the time of collision to three or three and one-half knots (R. 579, 580). It is all the more apparent from Vaux that the forward movement of the "Pennsylvanian" would have been substantially checked with the use of her port anchor. Thus the "Pennsylvanian's" fault in not making use of its anchor was a fault contributing proximately to the collision.

Opposing counsel says the matter of anchors was an afterthought (App. Br. 51). This is not true. What was or was not done with the anchors on the "Pennsylvanian" was peculiarly within the knowledge of the "Pennsylvanian's" officers. The issue naturally came up on cross-examination of appellee's first witness, Captain Norberg (R. 510-511). Dropping of an anchor was merely one method of taking proper steps to avoid a collision or of slowing the vessel down within the issues as made out in the libel (R. 7 and 8). The Court properly permitted the questions to be answered. The amendment was made, with the Court's approval, at the close of the testimony merely as a precautionary measure and after counsel had raised the issue (R. 855).

THE MAJOR AND MINOR FAULT RULE.

Counsel leans heavily upon the pronouncement in *The Victory*, 168 U. S. 410, 423; 42 L. ed. 528 (App. Br. p. 54), viz:

“As between these vessels, the fault of *The Victory*, being obvious and inexcusable, the evidence to establish fault on the part of *The Plymothian* must be clear and convincing in order to make a case for apportionment.”

This pronouncement must be read in light of the factual background. “*The Victory*”, headed down Elizabeth River, at first on the right side thereof, attempted—for no good reason—to cross the course of “*The Plymothian*” which was bound upstream on its own right side thereof. There was no suggestion that it was unsafe or impracticable for “*The Victory*” to hold to her right side. The contrast between the facts in *The Victory* and those in the instant case, already fully discussed, is obvious.

Counsel also quotes from *The Bilbster*, 6 F. (2d) 954, 956 (App. Br. p. 55), as follows:

“In determining faults, it is well to start about learning the obligations of the vessels at a time when they first saw or sighted one another.”

We have no quarrel with this statement; we agree therewith, but we disagree with counsel’s attempted application thereof to the instant case. “*The Stavan-*

garen" was headed upstream near the Narrows in New York Bay, on her starboard side of the channel, "The Bilbster" was on her port, outward bound. In the collision which followed "The Bilbster" was held solely at fault because she failed to pass port to port and sheered from the west to the easterly side of the stream. As in the case of "The Victory", "The Bilbster" involved a crossing.

Counsel in attempting to apply the above quotation from *The Bilbster* fails to consider the obligations of the "Pennsylvanian" at the time when she first saw the "Barry K". Although Norberg's view of the "Barry K" in the last mile stretch was unobstructed, Norberg was in doubt as to the "Barry K's" position and movements. Although Norberg saw two white mast lights, indicating to him a tug with barges, he fancied that a third mast light, which would have indicated a log raft behind, might have gone out (R. 471, 502). Although there is no evidence that the "Barry K" took a sheer, yet both Norberg and Vaux said they supposed it had. Although Norberg admitted knowledge of the likelihood that river boats might be coming up on the east side, nevertheless, he purported to be surprised that the tug was there. Although three starboard passing whistles were blown by the "Barry K", Norberg had to converse with ship's officers as to the nature of the first—he disregarded the other two. Although the "Barry K" sounded a danger signal at 2,500 to 3,000 feet and again at 2,000 feet, Norberg did not slow or stop the "Pennsylvanian's" engines until the ships were 1,200

to 1,500 feet apart, the "Pennsylvanian's" engines not being reversed when this distance had been reduced to 800 feet. This failure to make a timely stop and reversal of her engines when the "Barry K" blew the first danger signal, in itself prevents application of the major-minor fault rule to the "Barry K". Indeed, if that rule has any application, it would be against the "Pennsylvanian", whose course from the time the vessels came in sight of each other involved a veritable comedy of faults.

* * * * *

No consideration has been given to the matter of lights on the "Barry K's" barges because whatever their technical status, opposing counsel admits they did not contribute to the collision (R. 3) and no error is assigned in respect to this subject (R. 9-11). Damages are not in issue—they were stipulated (R. 53, 54). Assuming this case were properly one for divided damages, the form of the final decree is correct (R. 59-61). *The Chattahoochee*, 173 U. S. 540; 43 L. ed. 801. *Erie Railroad Co. vs. Erie & Western Transportation Co.*, 204 U. S. 220; 51 L. ed. 450.

CONCLUSION.

Our contentions may be summarized under three main propositions:

1. The "Pennsylvanian" was clearly at fault in the particulars assigned, which fault constituted a proximate cause of the collision.

2. By custom, based upon factors of safety and practicability, the "Barry K" had the right to be where it was at and before the time of collision.

3. If the Court should disagree with the proposition last above stated, still the "Barry K's" position on the river was not the proximate cause of the collision, but a mere condition. Thus, the Court is concerned only with the conduct of the pilots in view of the circumstances respectively facing each.

We submit that this Court should enter a decree denying to American-Hawaiian Steamship Company recovery of any damages whatsoever from Western Transportation Company, but awarding to Western Transportation Company recovery of that Company's entire damage from American-Hawaiian Steamship Company.

Respectfully submitted,

DEY, HAMPSON & NELSON

CLARENCE J. YOUNG,

Proctors for Western Transportation Company, Appellee and Cross-Appellant.

ADDENDA TO PAGE 59.

The Yoshida Maru, 20 F. (2d) 25 (C. C. A. 9th Cir.).

The West Hartland, 2 F. (2d) 834 (C. C. A. 9th Cir.).